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March 21, 2017

John J. Smith
Deputy Director, Air and Waste Management Division
U.S. Environmental Protection Agency – Region 7
11201 Renner Boulevard
Lenexa, KS 66219

Re: Comments on Draft Review of Corrective Action Component of Missouri's UST Program

Dear Mr. Smith:

Thank you for the opportunity to review this draft report and for your staff's willingness to meet with us and representatives of the Department of Natural Resources (MDNR) on January 12, 2017 to discuss it. At that meeting, all parties agreed additional written feedback would be provided jointly by the MDNR and the PSTIF; however, understandably, the new MDNR administration has other priorities. Therefore, this letter and the enclosed comments are being provided to document the concerns we have regarding the draft report.

The PSTIF Board of Trustees and its staff are committed to continuing our efforts to assure Missouri's tanks program is one of the best in the country. We look forward to working with MDNR Director Comer toward that goal and welcome EPA as a partner in that effort.

Sincerely,

A handwritten signature in blue ink that reads "Carol R. Eighmey".

Carol R. Eighmey

ENCLOSURE

CRE/dmj

cc: PSTIF Board of Trustees
Will Anderson, EPA/Office of Underground Storage Tanks



Petroleum Storage Tank Insurance Fund

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COMMENTS FROM THE PSTIF BOARD OF TRUSTEES AND STAFF
ON THE NOVEMBER 23, 2016 DRAFT EPA FY2016 PROGRAM REVIEW REPORT OF
MISSOURI'S UNDERGROUND STORAGE TANK PROGRAM CORRECTIVE ACTION COMPONENT

1. **The draft report asserts action has been delayed by the PSTIF's unwillingness to provide funds when humans are/were exposed to risks from UST leaks where the PSTIF was the responsible party's financial responsibility mechanism. We know of no such situations and request EPA either withdraw that assertion or inform us what persons at what sites were exposed to what risks, based on what data.**

As stated at the meeting on January 12, when such circumstances arise and the MDNR's emergency response personnel believe the source of the petroleum is a PSTIF-insured facility, per the PSTIF Board's regulations, emergency actions taken by that tank owner/operator are reimbursed without question. We have no data indicating an "inner city neighborhood in Kansas City" is "currently being exposed to vapor intrusion," as alleged in the draft report.

Because of Missouri's successful prevention efforts, the number of leaks from operating USTs that cause or threaten direct human exposure is *significantly less* now, (by an order of magnitude), than in the 1990's, although some do still occur. PSTIF has promptly provided funding for its insured UST owners and operators to respond to 15-20 such incidents in the last 4 years.

By comparison, 374 newly-identified UST releases were reported by MDNR to EPA in the last four years. For how many of these does EPA assert our response has been inadequate? And for how many of those was the PSTIF the FR mechanism?

2. **The draft report fails to acknowledge significant improvements made to the corrective action component of Missouri's UST program over the last four years.**

For example –

- a) Four (4) years ago, there were ~200 files where MDNR had not taken any action or sent any correspondence for 10+ years; today, there are none.
- b) Four (4) years ago, MDNR had no system for identifying stalled files where there is either an RP doing the cleanup or someone voluntarily doing so; now, there is a system by which the Tanks Section Chief regularly reviews database printouts to assure prompt action is occurring at all such sites. Four years ago, no letters were being sent on "stalled files;" now, dozens of such letters are sent each month.
- c) Four (4) years ago, Missouri did not know which cleanups were stalled because there was no viable Responsible Party. Now, a system has been implemented to

identify and code those in the MDNR database, allowing staff to identify and take prompt action for those where a RP exists.

- d) Four (4) years ago, Missouri had no means of knowing which cleanups were in danger of losing PSTIF benefits for a “pre-existing condition,” and in 2015-2016, MDNR/PSTIF collaborated with consultants to evaluate when and how to get those files closed to assure that funding is available to complete the cleanup.

All of these improvements, and others, were implemented as a result of a joint plan developed and implemented collaboratively by the MDNR and the PSTIF.

3. The draft report alleges cleanups in Missouri are “taking longer than necessary” and criticizes the pace of cleanups. However, it cites no benchmarks for this conclusion, identifies no other states being used for comparison, and does not define what timeframe EPA views as “necessary” or appropriate.

For example –

- a) On page 10, the draft report criticizes Missouri’s cleanup time of 99 months as of 6/30/16 for FRFE cleanups, as compared to an average time of 83 months as of 6/30/15. The criticism misuses the data. Because of the efforts made over the last four years, including a concentrated focus on older releases, *more older files were closed in FY16 than in FY15, causing the “average time to closure” to be greater.* This is a positive development, not a negative one.

Additionally, it is inaccurate to use PSTIF data to measure the time needed to complete cleanup. A cleanup is finished when the MDNR issues a No Further Action letter (NFA); it is quite common for a PSTIF claim file to remain open for 6-12 months after MDNR issues a NFA, since monitoring wells must be plugged and invoices submitted for that activity. Conclusions about “time to complete cleanup” must be based on MDNR data, not PSTIF data.

- b) According to a published EPA report, 60% of the nation’s “high priority releases” are 120 months or older. The PSTIF’s average of 99 months for all FRFE cleanups, including low priority ones, is shorter than the nation’s average for “high priority” cleanups.
- c) The draft report fails to note the 13% increase in FRFE cleanups in FY16 reported by EPA’s Office of Underground Storage Tanks.

- d) The draft report fails to acknowledge the PSTIF Board of Trustees' longstanding focus on accelerating the pace of cleanups cited by an independent, outside expert.¹
- e) EPA's published FFY16 statistics indicate Missouri had completed cleanup of 88.4% of known petroleum releases from federally-regulated USTs, higher than the national average, Nebraska, or Kansas. (At 9/30/16, Iowa's completion rate was 89.17%. As of 11/30/16, MO was 89.3%.)
- f) The draft report fails to analyze the pace of non-PSTIF-funded cleanups or compare it with the pace of PSTIF-funded ones. As shown on the enclosed graph, the gap between MDNR's total backlog and PSTIF's open claims has doubled (from ~7% to 14%) since the Joint MDNR/PSTIF Backlog Plan was implemented. (When open PSTIF claim files for which no release has been confirmed are subtracted from the data, the gap is even wider – i.e., 20% of UST cleanups currently being overseen by MDNR are *not* being funded by PSTIF.)

4. The draft report presents conclusions based on a review of 52 release files; however, for more than half of those files, the PSTIF was not the financial responsibility (FR) mechanism for the UST release. Analysis of the PSTIF as an FR mechanism based on these files is inappropriate.

Please note specifically:

- a) As of November 30, Missouri's "backlog" of confirmed UST releases numbered 805. The PSTIF is/was the FR mechanism for only about half of those. For the other files, the UST owner/operator would have been required under federal rules to have a FR mechanism. Did EPA's review include evaluating whether the required FR mechanism was/is paying for those cleanups and if not, why not?
- b) 15-20% of UST owners/operators use something other than the PSTIF as their FR mechanism, and some of them have reported releases. It appears EPA did not analyze the pace of cleanup at any of those sites.
- c) What specific aspect of Missouri's SPA is "not being complied with," as asserted on page 3?
- d) We appreciate EPA bringing to our attention its concern about the coverage long provided by the PSTIF. However, please note that:

¹ Actuarial Analysis of the Petroleum Storage Tank Insurance Fund as of June 30, 2016, by Taylor & Mulder.

- i. Since inception of the PSTIF as an FR mechanism in 1992, legal defense costs have been included in its \$1 million per occurrence limit; this was true in 1994 when EPA approved the PSTIF as a full coverage FR mechanism.
- ii. Before MDNR received State Program Approval (SPA) in 2004, it would have been EPA's responsibility to determine whether UST owners/operators were complying with EPA's FR rules. To our knowledge, EPA never informed any Missouri UST o/o that his/her PSTIF coverage was inadequate.
- iii. Of the ~2700 claims made to the PSTIF by insured UST owners/operators, there has been only one instance where the costs of cleanup, third party damages, and legal defense exceeded \$1 million; cleanup of that release was completed.
- iv. While it is appropriate for EPA to review Missouri's implementation of UST rules, including the FR rules, this would logically be done as part of EPA's review of the UST compliance component of the program, not the corrective action component.

5. The draft report fails to acknowledge a substantial portion of UST cleanups are being voluntarily done by persons who are not legally-responsible parties and for whom FR requirements are therefore irrelevant.

Any analysis of the pace of cleanups and the effectiveness of the PSTIF as an FR mechanism must necessarily distinguish between cleanups where there is a viable responsible party who can be compelled to act and those where there is not.

6. As EPA acknowledged during our January 12 meeting, the environmental profession requires making professional judgments, and it is not unusual for different environmental professionals to review the same data and come to different conclusions. The draft report seriously mischaracterizes circumstances where such professional differences have arisen and ignores how a new procedure implemented as part of the Joint DNR/PSTIF Backlog Plan has fostered collaboration to resolve such differences.

- a) In many of the files reviewed by EPA, it was the registered geologist or professional engineer engaged by the Responsible Party, or by the property owner voluntarily doing the cleanup, who had a difference of opinion with the MDNR. The draft report mischaracterizes all such instances as "PSTIF interfering with the cleanup" or something similar. Does EPA believe the PSTIF should pay for work when the environmental professional engaged by its insured does not think such work is required by MDNR's rules?
- b) Data assembled for the PSTIF Board of Trustees and provided to EPA indicated from 10/1/15 through 3/31/16, the Board's staff pre-approved 98% of the plans and cost estimates submitted. Rejecting proposed costs 2% of the time clearly does not constitute "refusing to pay for work on a fairly routine basis," as

asserted in the draft report. Further, review by an outside expert concluded the “push back” by the Board’s contractor is appropriate when plans are “more expensive than needed.”²

- c) The draft report recognizes the PSTIF Board of Trustees’ fiduciary duty and acknowledges its rules require PSTIF staff to determine whether costs are necessary, but then asserts the Board’s staff should never question whether the work is necessary. How can one determine whether costs are necessary without determining whether the work for which one is paying is necessary?
- d) In some cases, the consultant engaged by the PSTIF’s insured does poor quality work which is accepted by the MDNR, but with a subsequent demand for additional data collection and/or additional analysis. In these circumstances, the PSTIF may refuse to pay for the additional work or for redoing work already paid for but done poorly. The draft report seems to characterize this as a fault of the PSTIF; yet surely EPA agrees the PSTIF Board should not spend taxpayers’ money for poor quality work.
- e) Please also see our specific comments on pages 18-22 regarding files reviewed by EPA, as many relate to this issue.

7. Criticisms and questions about the governance structure and management of the PSTIF in the report are puzzling, given the PSTIF’s governance structure has remained unchanged for 20 years and is the same as it was during EPA’s last two reviews of Missouri’s corrective action program component.

Nevertheless, please note:

- a) Missouri is one of very few states in the country where there has never been a single cleanup delayed due to insufficient cash reserves in the state tank fund.
- b) The report asserts it is “uncommon” for management of the state tank fund and administration of the regulatory program to be housed in separate agencies. Our review indicates a similar structure exists in at least 9 or 10 of ~33 states with tank funds.
- c) The report asserts other such states have “relatively few problems.” Please identify which states were reviewed to come to this conclusion.
- d) As explained during our January 12 meeting, the PSTIF Board of Trustees is a Type III agency; a statutory description of such agencies can be found in Appendix B of the Revised Statutes of Missouri, enclosed.
- e) As explained during our January 12 meeting, the PSTIF Board of Trustees is accountable to the Governor of Missouri and to the trust fund participants.
- f) It is unclear how the third bulleted paragraph on page 18 relates to the corrective action component of Missouri’s program; we suggest it be deleted

² Actuarial Analysis of the Petroleum Storage Tank Insurance Fund as of June 30, 2016, by Taylor & Mulder.

from the draft report. As an aside, does EPA assert the PSTIF Trustees have no duty to represent the interests of Trust Fund participants?

- g) That same paragraph criticizes the composition of the PSTIF Board, set by statute enacted by Missouri's General Assembly 20 years ago. This composition is the same as it was in 2004 when EPA granted State Program Approval for Missouri's UST program and in the years EPA did its previous reviews of the corrective action component of Missouri's program.
- h) On page 6, the report states "administrative management" of the PSTIF "consists of an Executive Director..." The Board currently has two employees; please correct the report in that regard. Also on that page, it is not clear what is meant by "exists within MDNR organizationally." As explained during our January 12 meeting, Missouri's Governor annually organizes his agencies and assigns each Type III agency to a cabinet department for administrative purposes. Governor Geitens' plans are not yet known.

8. Without evidence, the report asserts the PSTIF Board or staff has withheld environmental data from MDNR.

The draft report asserts "PSTIF utilizes its organizational separation to limit or withhold information about releases or characterization from MDNR." Our review of the files listed in Appendix 1 did not reveal any evidence to support this assertion.

As acknowledged in the 1999 MOU between the MDNR and the PSTIF Board of Trustees, some PSTIF communications and information are confidential. Confidential information usually arises as a result of the Board's coverage for third party property damages and third party bodily injury and its practice of engaging legal counsel to represent its insureds when such damages are alleged. It is unclear why the draft report objects to the Trustees fulfilling this fiduciary and legal obligation to its insureds, and it should be noted the number of files where the Board has dealt with third party claims is very small compared to the total number of claims handled by the PSTIF.³

9. The draft report unjustly criticizes the PSTIF for paying for work without MDNR's approval.

Given the PSTIF Trustees' legal and fiduciary obligations, the independent authorities granted by law to the MDNR and the PSTIF, and EPA's desire that work proceed quickly when a UST release is suspected or confirmed, it is not clear why EPA would contend the Trustees cannot reimburse costs incurred by its insureds without MDNR's approval.

10. The draft report repeatedly refers to two files where there are substantial legal questions as to whether the tank owners are legally liable for performing actions being demanded by various parties, and inappropriately uses a necessarily

³ In the entire history of the PSTIF, there have been only ~150 such instances out of 6,000+ claims filed – far fewer than in many other states.

incomplete review of those two files to draw conclusions about the entire program.

Related to this issue, please also refer to Comment #1.

- a) Given the PSTIF has processed more than 6,000 claims since its inception, and in the last four years alone, has pre-approved costs for well over 10,000 projects, written 4115 checks, and reimbursed \$49 million, does EPA believe it is reasonable to draw conclusions based on two files where there are substantive legal issues being appropriately handled by knowledgeable lawyers representing all interested parties?
- b) The draft report presents disputed allegations being litigated in *State of Missouri, et. al., v Zill, LLC* as facts; we strongly suggest this is inappropriate. As an example, on page 20 EPA alleges “the contaminant plume” emanating from Zill exists “under at least three residential city blocks.” This is an unproven allegation and should not be presented as fact in the draft report.
- c) Several of the issues pertinent to these two files arose over differences of opinion as to whether the tank owner/operator is legally obligated to pay for certain tasks being demanded by others. Does EPA assert insurers have neither the right nor responsibility to question or deny costs if they believe their insured is not legally liable for them?
- d) On pages 4 and 13, the draft report alleges an order was issued by the MDNR, which a “responsible party” is now opposing in *State of Missouri, et. al. v. Zill, LLC*. To our knowledge, no order was issued by MDNR in that case.
- e) The last paragraph on page 15 asserts there is “the greatest potential” for cleanup and third party damages to “exceed the \$1,000,000 Financial Responsibility cap” at the Main Street Shell site. It then lists three Release Numbers associated with that site. Our data does not support this conclusion. On what basis has EPA concluded that actions taken in response to any or all of the three releases have “the greatest potential” to “exceed the cap?”
- f) The two files discussed at length in the draft report are ones for which some PSTIF records are confidential. Our staff alerted EPA personnel during their file reviews in August 2016 that certain documents were not available for their review, making it impossible for EPA to get a complete picture of all communications, actions, and decisions on those two files.
- g) The entire discussion about PSTIF on pages 15-17 rests on repeated references to these same two files. Likewise, pages 19-20 discuss the same two cases previously referenced repeatedly in earlier pages of the draft report. Conclusions about an entire program should not rest on two files, particularly when EPA has

incomplete information and has misunderstood or misstated certain facts about those files.

11. The draft report contains numerous other misstatements and errors, some of which are noted below:

- a) The PSTIF staffing level cited on page 12 is erroneous; as of September 2016, there were 13 FTEs managing claims for the Board.
- b) Page 7 of the draft report states, "Data was collected and reviewed from a variety of sources. These include the following: Interviews with PSTIF claims adjusters". The report goes on to list meeting dates and attendees for MDNR staff and management, PSTIF management, etc. but there is no listing of interviews with PSTIF claims adjusters. To our knowledge, no PSTIF claims adjusters were interviewed. Please either correct this misstatement or provide information on who was interviewed and when.
- c) The draft report relies on anonymous statements allegedly made by consultants. We do not think anonymous allegations are appropriate evidence to include in an official EPA report and would request, at a minimum, the names of consultants who were interviewed.
- d) Please disclose what consultants allegedly told EPA they have decided not to do PSTIF-funded work, as asserted in the draft report.
- e) Please disclose what consultants do not believe it is appropriate to "interact" with the party paying for their work, as referenced on page 16.
- f) The PSTIF Board does not hire consultants to do cleanups. It is not clear what is meant by the statement on page 15 that consultants have been "released" by PSTIF; please explain this statement.
- g) The second paragraph on page 16 states, "PSTIF does provide lists of consultants" to "responsible parties." It is true that PSTIF staff maintains a list of consultants who have done PSTIF-funded cleanups. The list is provided to any property owner – even ones who are *not* responsible parties – upon request and without recommendation or endorsement. (Please also note MDNR has similarly provided a list of consultants to persons who request it from that agency.) The draft report seems to suggest we should not provide this public service; please explain why.
- h) The draft report objects to the PSTIF Board's funding of MDNR; unless EPA is suggesting the MDNR would have been better able to carry out its responsibilities without that funding, the PSTIF Board should be commended for its willingness to provide this support.

- i) On page 6, the draft report states, "In some cases, loss of PSTIF coverage has brought cleanup actions to a halt." This statement is inaccurate; loss of coverage does not affect a claim previously made by an insured owner or operator nor terminate PSTIF benefits. Please provide examples and clarify this statement, or delete it from the report.
- j) The draft report quotes from EPA's 2012 review, but fails to acknowledge or address the PSTIF's response or actions taken by the PSTIF Board and staff since then. During our meeting on January 12, EPA staff indicated they had not reviewed that response in recent years. We suggest that information is relevant and should be reflected in EPA's review and report.
- k) Page 12 states, "In a few recent cases, MDNR has issued compliance orders..." Among all claims made by our insured owners/operators, we are aware of only one such file. Please either identify others or correct this misleading statement.
- l) Please indicate what document(s) is/are being referenced in footnote #24?
- m) Please explain the basis for the statement on page 15 that EPA's concern about the "reliability" of PSTIF as a financial responsibility mechanism is "most common when LUST contamination migrates off of the site and causes extensive citizen complaints of odors and vapors in their homes or businesses, lengthier threats of exposure, or actual direct exposures..."? What files were used to draw this conclusion? Did EPA review a statistically significant percentage of LUST files where there has been "migration of contamination offsite, citizen complaints, or actual direct exposures" to humans?
- n) In the case of Kennett Conoco, cited on page 15, where there were differences of professional opinions among the environmental experts, why is the fact that PSTIF engaged an outside, independent expert to provide a third-party opinion criticized? In that case, the corrective action plan eventually funded by PSTIF is guaranteed to meet DNR's cleanup standards for the amount of PSTIF money available; this is a better outcome than had we funded the previous plan, which would have cost more money than available from the PSTIF and which was not guaranteed to achieve cleanup. (Please note the PSTIF was not the FR mechanism for this release.)
- o) On page 15, following comments about Kennett Conoco in the next to last paragraph, the draft report alleges similarities between that situation and the Main Street Shell site. These are two very different cases, and the PSTIF did not engage a third party expert to provide an independent review of a corrective action plan for the Main Street Shell site. Therefore it is unclear what is meant by "This also occurred..."?
- p) Similarly, the next sentence on page 15 appears to conflate dissimilar files. PSTIF did not engage a third party expert on any of the three files cited. What

PSTIF action is EPA referring to in the sentence citing R8384, R6384, R7247, and “others,” and why was that action objectionable?

- q) Experience in both Missouri and nationally clearly indicates when state tank fund dollars are exhausted, cleanups stall. The draft report seems to allege on page 15 that it is a problem when PSTIF staff exercise an elevated level of involvement near the end of a project to assure the project is completed before available PSTIF benefits for that project are depleted. Why would EPA view PSTIF staff members’ diligence in assuring this does not happen as a negative?
- r) On page 16, the draft report alleges, “PSTIF staff stated during the interview that LUST sites with the most potential for redevelopment do require and justify more urgent attention than other sites.” No such statement was made, and in alleging it was, the report seriously mischaracterizes the conversation. What was said was that – at sites where there is no viable responsible party – it is imperative that prompt responses be provided by both MDNR and PSTIF if/when an interested buyer or developer comes along and there is suddenly an incentive for someone to do or complete an unfinished cleanup.
- s) Page 16 also asserts PSTIF staff stated they believe it is the fund’s statutory authority and duty to protect its insured against what they define as “erroneous claims.” This is not a term routinely used by PSTIF claims staff, nor do we recall using the term in conversation with EPA. Please clarify the context for this statement. Was it part of a discussion about the PSTIF Board’s obligation to its insured when a claim is made by a third party for property damages? If so, the following sentence, which references cleanup costs, is a non-sequitur.
- t) What is the basis for the statement on page 18 that, “PSTIF directs contractors to expend cleanup insurance funds to collect site data not requested by MDNR in order to dispute MDNR’s findings?” Again, this paragraph cites no examples except one of the same two files repeatedly referenced on the preceding pages.
- u) The fourth bulleted paragraph on page 18 mistakenly states that the PSTIF Executive Director “is also a member of the MPCA.” Dues of \$300 per year for an associate membership in MPCA are paid from the PSTIF so the Board and its staff have access to industry newsletters, publications, and meetings pertinent to their responsibilities. Please explain why EPA believes this is inappropriate.

APPENDIX B

REORGANIZATION ACT OF 1974

- Sec.
1. General provisions.
 2. Department of agriculture.
 3. Department of conservation.
 4. Department of economic development.
 5. Department of elementary and secondary education.
 6. Department of higher education.
 7. Department of highways and transportation.
 8. Department of labor and industrial relations.
 9. Department of mental health.
 10. Department of natural resources.
 11. Department of public safety.
 12. Department of revenue.
 13. Department of social services.
 14. Department of transportation.
 15. Office of administration.

Section 1. General provisions. — 1. This act shall be known as the "Omnibus State Reorganization Act of 1974."

2. The state constitution contemplates the separation of powers within state government among the legislative, the executive and the judicial branches of the government. The legislative branch has the broad purpose of determining policies and programs and reviewing program performance. The executive branch* has the purpose of executing the programs and policies adopted by the legislature and of making policy recommendations to the legislature. The judicial branch has the purpose of determining the constitutional propriety of the policies and programs and of adjudicating any conflicts arising from the interpretation or application of the laws.

3. Except for specific changes provided, the powers, duties and responsibilities of the elective offices of state government are not affected by this act.

4. It is the purpose of the general assembly in enacting this statute to provide for the improved accountability in performance of service to the citizens of the state and for the most efficient and economical operations possible in the administration of the executive branch of state government. All officers and employees of the state government are directed to implement this act in accord with this purpose.

5. (1) Except as otherwise provided by this act, or the state constitution, all executive and

administrative powers, duties and functions, excepting those of the elective offices, previously vested by law or otherwise in the several state departments, commissions, boards, offices, bureaus, divisions or other agencies are vested in the following administrative departments or in the office of administration: department of agriculture; department of conservation; department of elementary and secondary education; department of higher education; department of highways and transportation; department of labor and industrial relations; department of natural resources; department of mental health; department of public safety; department of revenue; department of social services.

(2) Whenever the term "**head of the department**" is used, it shall mean the head of one of the administrative departments created by this section or the office of administration, unless otherwise provided in this act.

6. (1) The head of each department shall be appointed, as provided by the constitution, by the governor with the advice and consent of the senate. The head of each department shall serve at the pleasure of the governor unless otherwise provided by the constitution or this act.

(2) Unless otherwise provided by this act, the head of each department is authorized to establish the internal organization of the department and allocate and reallocate duties and functions to promote economic and efficient administration and operation of the department. A departmental plan shall be developed by the head of each department and approved by the governor in accordance with the transfer by type provided in this act. A plan of such organization with any subsequent changes shall be filed with the secretary of state in the manner in which administrative rules are filed, and copies of the plan shall also be filed with the commissioner of administration and revisor of statutes, and such plans shall be published in an appendix to the revised statutes of Missouri and supplements to the revised statutes. Plans shall be filed before

June 30, 1974, for the initial reorganization, and shall be effective when filed, unless the plan provides otherwise. Thereafter, any plan of reorganization shall be filed on or before December thirty-first of each year and shall become effective, as applicable to departments, divisions, agencies, boards, commissions, units or programs transferred by type II or type III transfers as provided in this act, only as provided in sections 26.500 to 26.540, RSMo, except as herein provided in subsections 12 and 13 of section 1. The plan shall provide for the level of compensation for division and other administrative positions, subject to appropriations therefor. The head of any department may cooperate with the head of any other department in the interchange of personnel, joint use of equipment and generally in any manner promoting the more effective and efficient rendering of service. The purpose of appropriations made to any department in the executive branch of government shall not be altered without the prior approval of the fiscal affairs committee and the concurrence of the commissioner of administration.

(3) When the head of the department is a commission or board it shall appoint a director of the department unless otherwise provided by this act and may delegate such duties, powers and authority to the director of the department as it deems necessary to fulfill the duties and obligations of the department. Such director shall serve at the pleasure of the head of the department and shall have the title of office provided herein.

(4) (a) The head of each department, unless otherwise provided by this act, shall have exclusive budget-making powers for the department and for each division, commission, board, unit or other agency within the department. The head of the department shall submit estimates of requirements for appropriations on behalf of the department and each division, commission, board, unit or other agency within the department, as provided by section 33.220, RSMo. Each division, commission, board, unit or other agency within the department shall present its estimate of requirements to the department head each year at or before such time as the head of the department directs. The department head shall review each estimate submitted to it and may modify any estimate. The department head shall consolidate all estimates or requirements for appropriations and prepare an estimate for submission on behalf

of the department and each division, commission, board, unit or other agency within the department, subject to the form prescribed by section 33.220, RSMo.

(b) The head of the department shall prepare all budgets for agencies within his department and shall present the budget to the commissioner of administration. The commissioner shall consolidate all department budgets and submit the same in a single document to the general assembly.

(5) The head of the department shall approve all written annual reports which are required by law, of each division, board, commission, unit or agency within the department before the reports are submitted for printing and distribution.

(6) The director of each department may designate by written order filed with the governor and president pro tem of the senate a deputy director of the department, to act for and exercise the powers of the director only during the department director's absence for official business, vacation, illness, death, resignation or incapacity. When a deputy director acts as director of the department he shall receive a salary at the level provided for the director of the department when he has acted in such a capacity for longer than thirty days. A deputy director, however, shall not exercise the powers of the director for more than six consecutive months. Subject to the provisions of chapter 36, RSMo, where they apply, the department director shall appoint all division heads unless otherwise provided in this act and such division heads and the deputy director of the department shall serve at the pleasure of the director of the department or unless otherwise provided by this act.

(7) Nothing in this act shall be construed so as to remove any state agency or unit thereof or any position of employment from coverage under the provisions of the merit system law if the agency or position was covered by that law on the effective date of this act.

7. (1) To effect an orderly transition to the departments established by this act, each existing department, division, agency, board, commission, unit or program shall be transferred, as provided, by July 1, 1974.

(a) Under this act a "type I transfer" is the transfer to the new department or division of all the authority, powers, duties, functions, records, personnel, property, matters pending and all

other pertinent vestiges of the existing department, division, agency, board, commission, unit, or program to the director of the designated department or division for assimilation and assignment within the department or division as he shall determine, to provide maximum efficiency, economy of operation and optimum service. All rules, orders and related matter of such transferred operations shall be made under direction of the director of the new department.

(b) Under this act a **"type II transfer"** is the transfer of a department, division, agency, board, commission, unit, or program to the new department in its entirety with all the powers, duties, functions, records, personnel, property, matters pending, and all other pertinent vestiges retained by the department, division, agency, board, commission, unit or program transferred subject to supervision by the director of the department. Supervision by the director of the department under a type II transfer shall include, but shall be limited to: budgeting and reporting under subdivisions (4) and (5) of subsection 6 of this section; to abolishment of positions, other than division, agency, unit or program heads specified by statute; to the employment and discharge of division directors; to the employment and discharge of employees, except as otherwise provided in this act; to allocation and reallocation of duties, functions and personnel; and to supervision of equipment utilization, space utilization, procurement of supplies and services to promote economic and efficient administration and operation of the department and of each agency within the department. Supervision by the director of the department under a type II transfer shall not extend to substantive matters relative to policies, regulative functions or appeals from decisions of the transferred department, division, agency, board, commission, unit or program, unless specifically provided by law. The method of appointment under type II transfer will remain unchanged unless specifically altered by this act or later acts.

(c) Under this act a **"type III transfer"** is the transfer of a department, division, agency, board, commission, unit or program to the new department with only such supervision by the head of the department for budgeting and reporting as provided under subdivisions (4) and (5) of subsection 6 of this section and any other supervision specifically provided in this act or later acts. Such supervisions shall not extend to substantive matters relating to policies, regulative functions or appeals from decisions of the depart-

ment, division, agency, board, or commission unless otherwise provided by this act or later acts. The method of appointment under type III transfer will remain unchanged unless specifically altered by this act or later acts.

(d) Under this act a specific type transfer is any transfer other than type I, type II and type III transfers.

(e) All references in this act are to the whole department, division, agency, board, commission, unit or program of state government or all the chapters or sections of the statutes named except any sections, part of sections, parts of chapters or parts of the department, division, agency, board, commission, unit or program otherwise transferred by other provisions of this act.

(2) Heads of departments or agencies affected shall prepare orderly transfer arrangements relating to personnel, equipment, other property and matters pending, and they shall prepare a formal transfer agreement which shall not go into effect until approved by the commissioner of administration. Unencumbered appropriation balances in whole or in part may be transferred on approval of the governor and the state fiscal affairs committee. Copies of all transfer agreements and approved transfers of appropriation balances shall be filed in the office of the state fiscal affairs committee, office of the revisor of statutes, office of administration and the secretary of state's office, and such copies shall be available in those offices for public inspection.

(3) Any matter pending before any department or agency on the effective date of transfer shall be assumed by the department or agency which will exercise the duty or power relating to the matter after the effective date of transfer and there shall be no interruption of process in such a transfer. All rules, forms and procedures will remain unchanged for a period of ninety days following transition and then may be changed only as provided by law, the transfer agreement, or by executive order.

8. (1) The transfers provided by this act shall be effected by June 30, 1974, by executive order of the governor in accord with the provisions of this act and subject to filing required transfer agreements, the appointment of officers, approval of transfer of appropriations and the approval of the commissioner of administration. The governor shall appoint the heads of the departments as soon as is possible, after the effective date of this act. The period from the

effective date of this act to the date of transfer shall be devoted to planning and arranging the transition and in establishing the internal structure of each department to insure the uninterrupted operations of state government. During the transition period, officers appointed to new departments may also serve in positions in existing agencies but shall receive only the compensation provided for the new position to which they will serve after transfer. If at any time positions in the executive branch are transferred to coverage under chapter 36, RSMo, all incumbents of such positions with at least twelve months of prior service on the effective date of this act shall have incumbency preference and shall be permitted to retain their positions provided they meet qualification standards acceptable to the personnel division of the office of administration. An employee with less than twelve months of prior service on the effective date of this act or an employee who is appointed to such a position after the effective date of this act and prior to the classification and allocation of the position by the personnel division shall be permitted to retain his position providing he meets acceptable qualification standards and subject to successful completion of a working test period which shall not exceed twelve months of total service in the position. After the allocation of any position to an established classification, such position shall thereafter be filled only in accordance with all the provisions of chapter 36, RSMo.

(2) All expenditures of state funds by any department, division or other agency within the executive branch of state government shall be made only in the amounts and for the purposes as directed by the general assembly in the act appropriating the money to the department, division or other agency, except as provided in subsection 6, subparagraph (2) and subsection 9 of this section.

9. In establishing the positions and supporting staff of each department created by this act, the costs of such positions and operations will be met as far as possible by utilizing funds for existing positions or funds available from vacant positions within the appropriations of the departments, divisions, agencies, boards, commissions, units or programs assigned to the department.

10. In financing the administrative transfers provided in this act it is the intent of the general assembly to respect the segregation of funding provided by the constitution or law.

11. Nothing in this act shall be interpreted as transferring any employee from one state pension or retirement system to another.

12. The governor is authorized to create by executive order such advisory councils or committees as may be required to conform with requirements to receive federal grants, provided that such executive orders shall be submitted as provided in sections 26.500 through 26.540, RSMo, except that such executive orders shall be effective immediately, but will be void if a resolution to disapprove is adopted by either house of the general assembly as provided in sections 26.500 through 26.540, RSMo. The head of the department shall appoint all members of such advisory councils unless federal law or regulation or this act requires otherwise, in which case they shall be subject to the federal requirement as shall be provided by executive order. Members of such advisory councils shall be allowed only reimbursement for their actual and necessary expenses from the appropriations made to the department or agency to which they render advice. All advisory councils or committees shall annually make a report on their activities to the director of the department including all recommendations. A copy of each such report shall be transmitted by the advisory committee to the governor and to the legislative library.

13. If any matter, relating only to assignment of agencies, programs or operations, is left unresolved by this act, or must be adjusted to conform with federal law or regulation to receive federal aids, the governor may by executive order resolve the matter; provided that such executive orders shall be submitted, as provided in sections 26.500 through 26.540, RSMo, except that such executive orders shall be effective immediately, but will be void if a resolution to disapprove is adopted by either house of the general assembly as provided in sections 26.500 through 26.540, RSMo.

14. (1) Unless otherwise provided, where this act establishes a method of appointment other than presently provided by law, those persons serving terms fixed by law shall serve out the remainder of the term for which they were appointed and on the expiration of terms, after July 1, 1974, the appointment shall be made as provided herein. The qualifications, terms, compensation and related matters will remain as in present law except as specifically altered by this act.

(2) All department heads, directors of departments, members of boards and commissions, and such other officers as directed by law shall qualify for their office by taking an oath to support the Constitution of the United States and the Constitution of the state of Missouri and to faithfully demean himself, in the office to which he has been appointed.

15. (1) Where this act changes titles or eliminates positions, departments, divisions, commissions, boards, agencies or units, the office as changed or the position assuming the duties of abolished positions, departments, divisions, commissions, boards, agencies or units shall fulfill all duties, serve in all ex officio capacities and in every way be read into the law as the official or agency named as successor unless otherwise provided by this act. Where this act changes the method of appointment of officials, said provision also requires that any reports to be rendered be rendered to the authority making the appointment unless otherwise provided herein.

(2) All officers or employees shall be bonded, as required by law or by the governor by executive order. The commissioner of administration shall have the authority, however, to place all elected or appointed officers or employees, required to be bonded, under a blanket bond to the extent feasible. All bonds, blanket or individual, shall be obtained on the basis of competitive bidding.

16. The staff of the committee on legislative research shall prepare reorganization-revision bills to be submitted to the eightieth general assembly to revise the statutes so as to reflect the changes made by or pursuant to this act and shall, for consideration of the eightieth general assembly, prepare such other reorganization-revision bills as may be found to be necessary to meet the requirements of the amendment to the constitution adopted August 8, 1972, and this act; except that the committee on legislative research shall use fully section 3.060, RSMo, where it will suffice. At such time as all statutory revision changes required pursuant to this act have gone into effect the revisor of statutes may prepare legislation to repeal this act.

(L. 1973 1st Ex. Sess. S.B. 1, A.L. 1977 H.B. 841, A.L. 1980 S.B. 517)

*Word "as" appears in original rolls.

(1976) Transfer of appropriations by commissioner of administration with the authorization of the fiscal affairs committee is unconstitutional and violates Art. III, § 36, Const. of Mo. State ex inf. Danforth v. Merrell (Mo.), 530 S.W.2d 209.

Section 2. Department of agriculture. — Transferred to Section 261.023

Section 3. Department of conservation. — Transferred to Section 252.002

***Section 4. Department of economic development.** — Section 4 was repealed and reenacted by Senate Bill 16 1st Regular Session of the 81st G.A. and has been assigned section number 620.010 in chapter 620, RSMo.

*Changed 1984, to Department of Economic Development by reason of amendment of the Mo. Constitution Art. IV §§ 12, 36(a).

Section 5. Department of elementary and secondary education. — Transferred to Section 161.020

Section 6. Department of higher education. — Section 6 was repealed and reenacted by Senate Bill 113 1st Regular Session of the 82nd G.A. and has been assigned section number 173.005 in chapter 173, RSMo.

***Section 7. Department of highways and transportation.** — Transferred to Section 226.005

*Changed Nov. 6, 1979, to Highways and Transportation by reason of amendment of the Mo. Constitution Art. IV § 12.

Section 8. Department of labor and industrial relations. — Section 8 was repealed and reenacted by Senate Bill 389 1st Regular Session of the 81st G.A. and has been assigned section number 286.005 in chapter 286, RSMo.

Section 9. Department of mental health. — Transferred to Section 630.003

Section 10. Department of natural resources. — Transferred to Section 640.010

Section 11. Department of public safety. — Section 11 was repealed and reenacted by H.B. 140 1st Reg. Sess. of 83rd G.A. and has been assigned section number 650.005 in Chap. 650, RSMo.

Adjutant general, *see* 650.005

Fire marshal, state, *see* 650.005

Highway patrol, state, *see* 650.005

Highway safety, *see* 650.005

Liquor control, supervisor, *see* 650.005

Militia, state, *see* 650.005

Public safety, department of, created, *see* 650.005

Division of veterans' affairs, *see* reorganization plan no. 3, February 4, 1981, appendix A, for transfer of division to department of public safety, adjutant general.

Water safety, division of, *see* 650.005

Section 12. Department of revenue. —
Transferred to Section 32.028

*Department of Transportation was merged with the highway department by constitutional amendment Art. III § 29 Nov. 6, 1979.

Section 13. Department of social services.
— Section 13 was repealed and reenacted by Senate Bill 717 Second Regular Session of the 81st G.A. and has been assigned section number 660.010 in chapter 660, RSMo.

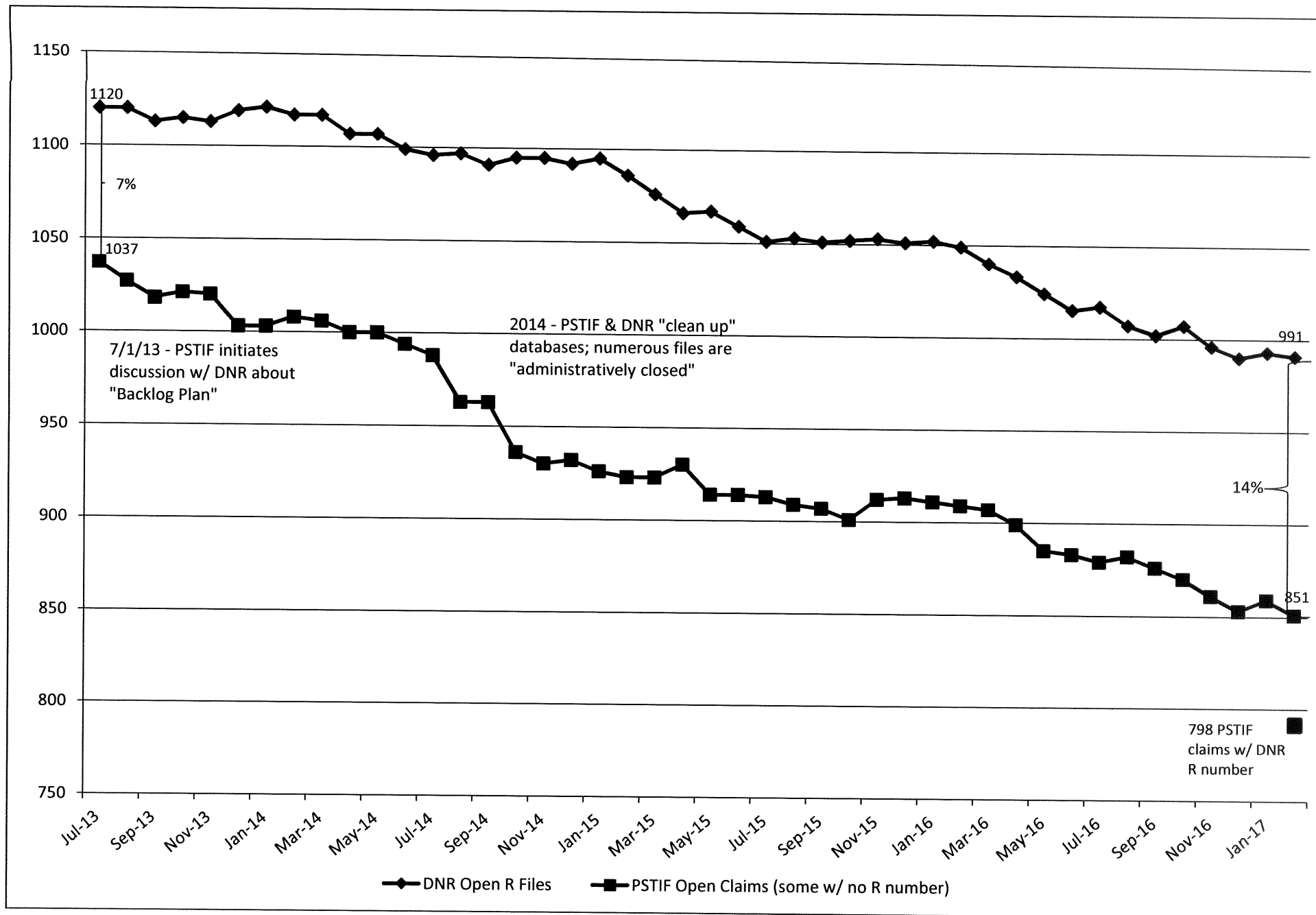
Effective 4-7-82

***Section 14. Department of transportation.**
— Transferred to Section 226.007

Section 15. Office of administration. —
Section 15 was repealed and reenacted by House Bill 353 1st Regular Session of the 82nd G.A. and has been assigned section number 37.005 in chapter 37, RSMo.

Cross Reference

Personnel advisory board transferred to office of administration, RSMo 36.050



Responses to Specific Files Listed in Appendix 1 of EPA's Draft Report

1. R1041/Claim #50010 – Former Kirkwood Amoco.

- a. It is not clear what the basis is for EPA's assertion that PSTIF "interfered with Technical Scope of Work by Controlling Reimbursement?" Was it because PSTIF staff refused to pay for reinstallation of the deep vapor monitoring wells after one of them could not be sampled and data from all other deep vapor wells showed no unacceptable risks for a future hypothetical building? Was it because the PSTIF did not agree to pay for corrective action based on one deep vapor well, when it had not been shown representative concentrations posed a risk, as specified by MDNR's regulations and guidance?
- b. Was discussion of the soil vapor sampling protocol and a method for assessing plume stability the basis for EPA's assertion that a delay was "Caused Due to Disputes between MDNR and PSTIF" and EPA's assertion "PSTIF Suggest[ed] Variances from Cleanup Guidance and Protocols for Sites with Potential for Redevelopment"? Is it not reasonable to consult an outside and nationally-recognized expert (Blayne Hartman) to assist in determining vapor sampling protocol when unusual geological conditions (i.e. moisture in deep vapor wells) are encountered?
- c. Was PSTIF seeking an outside expert opinion on vapor sampling protocol the basis for the assertion "PSTIF/Consultants Acting Without MDNR Input and/or Knowledge?" Is EPA aware MDNR, the consultant and PSTIF had a meeting to discuss these issues and they were resolved to everyone's satisfaction?

2. R1044/Claim #50012 – Former Junior Food Mart:

- a. What is the basis for the assertion "PSTIF Interfering with Technical Scope of Work by Controlling Reimbursement?"
- b. Was Williams & Company's staff's discussion of various remediation approaches with the environmental consultant the basis for EPA's assertion of "PSTIF Coaching Consultants on How to Respond to MDNR Critique or Suggesting Changes to Consultants Reports In-Line with PSTIF Opinions?" Williams & Company's contract with the PSTIF Board of Trustees requires its staff to adjudicate eligible claims in accordance with 10 CSR 100-5.010 (3), which states: "The board retains final authority to make a determination concerning all eligibility issues, including but not limited to, whether costs for products and services were reasonable, and whether the costs incurred were necessary to achieve the cleanup required by the Department of Natural Resources." Discussion of cleanup approaches and the related costs with environmental consultants is acting

in accordance with this regulation. Failure to do so would be a breach of fiduciary duty.

3. R3271/Claim #50416 – Casey's General Store #1033:

- a. Is the basis for EPA's assertion "PSTIF Interfering with Technical Scope of Work by Controlling Reimbursement" related to the fact that the consultant proposed a ~\$100,000 corrective action plan and a ~\$10,000 point of demonstration well without any data demonstrating a risk exists which needs to be mitigated?
- b. Is EPA's assertion "Delays Caused Due to Disputes between MDNR and PSTIF" based on the fact that the environmental professionals involved with this file disagreed on the stream sampling protocol? If so, please note the agreed-upon dispute resolution process produced an agreement to sample the stream in a manner similar to the protocol implemented three previous times on this site by the consultant, which was done with MDNR's approval and paid for by PSTIF.
- c. Does EPA believe it is technically wrong to sample the actual receptor, (the stream, in this case), in lieu of indirect analysis by installing and sampling a point of demonstration well some distance from the receptor?

4. R6384/Claim #60686 – Townley's Station and Car Wash:

- a. What is the basis for the assertion "PSTIF Interfering with Technical Scope of Work by Controlling Reimbursement"? Does EPA recognize once the project got re-started, PSTIF approved costs for two EPA-recommended techniques, (MIP and LIF investigations in 2015), to expedite characterization of the site?
- b. Did EPA recognize work was restarted in 2014 on this 1998 release after a 10-year hiatus because PSTIF identified it as a "low-hanging fruit" file and urged MDNR to compel action by the responsible party?
- c. What is the basis for the assertion "Delays Caused Due to Disputes between MDNR and PSTIF?" The "responsible party" for this cleanup was non-cooperative which delayed the initial cleanup process. We are not aware of any delays since the project was re-started. The consultant has installed forty five new wells (many of which were approved by PSTIF staff as additions to the MDNR-approved work plan while onsite to observe and document site characterization activities), including fourteen wells installed after the LIF investigation. What would have been the value of submitting interim reports to MDNR when all parties recognized this delineation was necessary and required by MDNR's regulations. Does EPA believe PSTIF stalled the cleanup by reviewing cost options or well construction issues?
- d. What is the basis for the assertion "PSTIF/Consultants Acting Without MDNR Input and/or Knowledge"?

5. R7846/Claim #40892 – Former Triple K:
 - a. Is the basis for EPA's assertions "PSTIF Interfering with Technical Scope of Work by Controlling Reimbursement" and "Delays Caused Due to Disputes between MDNR and PSTIF" the disagreement between PSTIF and MDNR on whether there is a future risk to drinking water wells and whether available data demonstrated the contaminate plume was stable? If so, how is this not simply a difference of professional opinion among qualified experts? And why would EPA assert the taxpayers should pay for work that qualified experts believe is unnecessary? The party doing the cleanup had used numerous consultants on this project and believed the consultants just wanted to drill more wells on the property; he objected to such work, even if it was fully reimbursed by PSTIF. His most recent consultant agreed with PSTIF the groundwater exposure pathway is incomplete and the "plume" is stable. How does EPA contend such differences of professional opinion among environmental experts should be resolved? Does EPA recognize it was the PSTIF who proposed a formal procedure be developed for resolving such differences, so projects do not stall indefinitely, as had been the case previously?
 - b. What is the basis for the assertion "PSTIF/Consultants Acting Without MDNR Input and/or Knowledge"?
6. R8384/Claim #62598 – Casey's General Store #2695:
 - a. Was PSTIF's refusal to approve costs for an HVE event on a well that did *not* contain free product the basis for EPA's assertions "PSTIF Interfering with Technical Scope of Work by Controlling Reimbursement" and "Delays Caused Due to Disputes between MDNR and PSTIF?" Please note the consultant also proposed LIF related to occasional LNAPL in one well, an approach deemed under the Board's rule 10 CSR 100-5.010 as not cost effective. The PSTIF Claims Supervisor and the MDNR Unit Supervisor met in early December 2016 to discuss the file; they reviewed site characterization information and agreed LIF was not appropriate. They further agreed a better approach is installation and sampling of one additional well in a specific location. This outcome again demonstrates the efficacy of the dispute resolution procedure implemented by the MDNR and the PSTIF in recent years.
 - b. What is the basis for EPA's assertion "PSTIF/Consultants Acting Without MDNR Input and/or Knowledge"?
7. R8151/Claim #52449 - Kennett Conoco:
 - a. Please refer to Comment #x. Please also note MDNR's Tanks Section, like the PSTIF, also conferred with "an independent expert" in the Department's RCRA Section to supplement the Tanks Section's review.

The MDNR's "independent expert" opined in a July 20, 2012 letter that more wells would be needed, LNAPL skimmers would need to be installed, and the CAP did not address LNAPL below the water table, indicating the CAP was inadequately designed. Subsequently, the independent expert engaged by the PSTIF -- and paid from PSTIF funds, not funds reserved for this cleanup -- completed his evaluation less than 6 weeks after MDNR communicated its concerns about the CAP to the consultant and property owner. Please explain how this action by PSTIF caused any undue delay.

- b. What is the basis for EPA's assertion "PSTIF Coaching Consultants on How to Respond to MDNR Critique or Suggesting Changes to Consultants Reports In-Line with PSTIF Opinions?"
- c. What is the basis for EPA's assertion "PSTIF Suggesting Variances from Cleanup Guidance and Protocols for Sites with the Potential for Redevelopment?"

8. R8697/Claim # 62913 - Fast Trip 40:

- a. What is the basis for EPA's assertion "PSTIF Interfering with Technical Scope of Work by Controlling Reimbursement?" Please note this PSTIF-insured tank owner was sued by a third party; the PSTIF engaged an attorney on December 13, 2013 to represent the insured. Is EPA asserting that the insured's attorney has no authority to take actions or make decisions he deems in the best interest of his client? Is EPA asserting such actions and decisions are somehow "the fault" of the PSTIF and criticizing the PSTIF for such actions and decisions? Please note the PSTIF Claims Manager has made multiple efforts to keep MDNR apprised of developments on this file, including in-person conversations on with the Tanks Section Chief on February 20, 2014, December 10, 2014, and again on November 24, 2015. In addition, emails were sent by PSTIF's Claims Manager to MDNR's Environmental Specialist overseeing the cleanup on March 4, 2014 and again on March 10, 2015, advising the MDNR Environmental Specialist of developments.
- b. What is the basis for the assertion "PSTIF/Consultants Acting Without MDNR Input and/or Knowledge?" As noted in "a." above, there were multiple communications between PSTIF and MDNR on this file. Also, MDNR's representative on the PSTIF Board of Trustees is well aware of the on-going litigation-related issues that have affected response time and actions on this file.

9. A significant percentage of the files reviewed by EPA are ones for which third party claims have been made, resulting in the PSTIF engaging counsel to represent its insured. Comments and questions similar to those presented for Fast Trip #40 above are applicable to the following additional files:

R7247/Claim #61283 – Former Davis Automotive

R8920/Claim #63351 -- Breaktime #3156

R9051/Claim #63514 and R009133/Claim #63646 –

Main Street Shell

R8771/Claim #62330 and R9048/Claim -- 63582 Zill LLC

R8682/Claim #63012 -- Fastgas 'N Snax